PRE-APPEAL BRIEF REQUEST FOR REVIEW	Docket Number 042933/281559
(filed with the Notice of Appeal)	

Application Number 09/659,416	Filed September 11, 2000

First Named Inventor Arto Astala

Art Unit 2143	Examiner Nguyen, Phuoc H.

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
        Note: No more than five (5) pages may be provided.

Respectfully submitted,

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Date _____October 24, 2008_____

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Attachment
Reasons for Requesting Pre-Appeal Brief Request For Review

I. The independent claims are not anticipated by the cited reference

Claims 47-49 and 66-75 stand rejected under 35 U.S.C. §102(a) as being anticipated by Kroening et al. (U.S. Patent No. 6,080,207, hereinafter "Kroening"). Claim 50 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Kroening in view of Kyle (U.S. Patent No. 6,141,681. Applicant respectfully requests reversal of the rejections above.

Independent claims 47, 70, 72 and 74 each provide, *inter alia*, receiving a configuration upgrade message from a source of a software upgrade. In other words, the message relating to the upgrade is received from the device actually providing the upgrade.

The Response to Arguments section of the final Office Action (pages 6-8) alleges that the transaction between the order entry BOM (15) and the image builder (20) "is considered as a type of configuration upgrade message". The final Office Action then concludes that "the configuration server as the image builder server 20 receives the transaction or a type of configuration upgrade message from a source". Thus, the final Office Action has apparently misconstrued the claimed invention by neglecting the fact that the configuration upgrade message of the claimed invention is received from a source of a software upgrade, and not just from a source in the abstract. To be sure, the order entry BOM is a source of messages for the image builder server. Moreover, the messages for which the order entry BOM is a source may arguably be considered as a type of configuration upgrade message. However, even if one assumes these allegations to be true, Kroening still fails to meet the claimed invention. In this regard, what is claimed is receiving a configuration upgrade message from a source of a software upgrade and not simply receiving a configuration upgrade message from any abstract source such as a source of the message.

Kroening is directed to a method for generating a custom configuration for a computer hard drive. The order entry BOM of Kroening is clearly disclosed as being the device into which a customer's order is entered to establish a bill of materials (BOM). The BOM merely indicates the desired software configuration selected by the customer (col. 4, lines 8-12). The BOM is then used by the image builder to find a saved configuration or create one corresponding to the desired configuration indicated by the customer. As such, **the order entry BOM is not a source of the software upgrade**. Instead, the order entry BOM merely indicates what kind of upgrade

is desired. The source of the upgrade is the image builder, which actually receives the BOM in Kroening. Accordingly, there is no configuration upgrade message received from a source of a software upgrade either taught or suggested in Kroening.

The Advisory Action alleges that the software image builder can be considered a source of the software upgrade since the claim does not specify any structure or type of the source of software upgrade. The Advisory Action therefore concludes that any source, whether directly or indirectly related to the software upgrade, would meet the claimed invention. Applicant agrees with the Advisory Action's conclusions above to a point. In this regard, the software image builder (as Applicant argued above) could be considered a source of a software upgrade. However, even if one assumes that the software image builder is a source of a software upgrade then it would be the software image builder that would be required to provide the configuration upgrade message of the claimed invention. In this regard, as indicated above, the final Office Action contrarily alleges that "the configuration server as the image builder server 20 receives the transaction or a type of configuration upgrade message from a source". Thus, the image builder cannot be both the source itself and receive an upgrade message from a source. Accordingly, the Advisory Action's attempt to indicate how the image builder could be a source of a software upgrade undermines the position taken in the final Office Action that the image builder receives a configuration upgrade message from a source and clearly demonstrates the position argued by the Applicant above. In this regard, the order entry BOM is not a source of the software upgrade, but the image builder could be. However, the image builder cannot be a receiver of the configuration upgrade message by the Advisory Action's own construction. Thus, Kroening fails to teach or suggest <u>receiving a configuration upgrade message from a source of a software upgrade</u> as recited in independent claims 47, 70, 72 and 74.

Notably, independent claims 49, 71, 73 and 75 do not state that the configuration upgrade message is received from a source of the software upgrade. Instead, independent claims 49, 71, 73 and 75 provide that the message is received from a service provider capable of providing an end service product. However, the order entry BOM does not provide an end service product. Quite to the contrary, the order entry BOM merely indicates parameters desired in an end service product. The end service product is provided by another device. As such, Kroening fails to teach or suggest that the message is received from a service provider capable of providing an end service product as provided in independent claims 49, 71, 73 and 75.

The Advisory Action alleges that the claim never specifies the end service product and thus, the Examiner interprets the end service product to be the result of any service. Thus, the Advisory Action concludes that the BOM corresponds to a service provider. However, even as indicated in the Advisory Action, the BOM merely "sends the request of upgrade to the server". Thus, by the admission of the Office Action the BOM merely indicates parameters desired in an end service product. More specifically, as specifically indicated by Kroening, the BOM merely indicates the desired software configuration selected by the customer (col. 4, lines 8-12). An indication of a desired software configuration selected by a customer cannot reasonably be considered the provision of a service since it is instead quite clearly defining parameters for meeting a request for a service, namely the provision of a desired software configuration. The provider of the software configuration would clearly be the service provider in such a scenario.

Due to Kroening's failure to teach or suggest the features above, independent claims 47, 49 and 70-75 are neither anticipated nor obvious in view of Kroening. The Response to Arguments section of the Office Action also alleges that Kroening discloses identifying a plurality of users having a contract requiring delivery of an end service product at col. 4, lines 4-8, col. 5, lines 5-52 and col. 6, lines 51-60. However, this additional feature is in no way taught or suggested in the cited passages or anywhere in Kroening. The cited passages deal with an image server pushing designated images down to clients via broadcast or MIS. The Office Action alleges that the clients assigned to receive the designated images are determined/identified within the broadcast transmission. However, even if one assumes this allegation to be completely correct, there is no teaching or suggestion in Kroening that the identification or determination of clients assigned to receive the designated images is made on the basis of identifying users having a contract requiring delivery of an end service product as provided in independent claims 49, 71, 73 and 75. Thus, Kroening's alleged suggestion of determining or identifying recipients is in no way suggestive of determining or identifying recipients in any particular manner, much less identifying a plurality of users having a contract requiring delivery of an end service product as recited in independent claims 49, 71, 73 and 75.

Given that Kroening fails to teach or suggest identifying a plurality of users meeting the recited criteria above, Kroening also necessarily fails to teach or suggest providing product information relating to the end service product to respective servers associated with the plurality of users identified as having a contract requiring delivery of an end service product as recited in

independent claims 49, 71, 73 and 75.

Applicant also respectfully notes that independent claims 47, 49 and 70-75 also indicate that the software upgrade or product information is provided to respective terminal servers associated with a plurality of users identified. However, Kroening only discloses one server (the image server 40), which provides the image to all image systems having a known error (col. 5, lines 49-52). Thus, Kroening fails to teach or suggest the provision of anything to "respective terminal servers" that are associated with a plurality of users. Accordingly, for this reason as well, Kroening fails to anticipate independent claims 47, 49 and 70-75.

Kyle fails to cure the above noted deficiencies of Kroening and is not cited as such. Accordingly, for all the reasons provided above, independent claims 47, 49 and 70-75 are patentable over Kyle and Kroening, alone or in combination.

Claims 48, 50 and 66-69 each depend directly or indirectly from a respective one of independent claims 47 and 49 and therefore include all the recitations of their respective independent claims. Thus, dependent claims 48, 50 and 66-69 are patentable for at least the same reasons given above for independent claims 47 and 49.

Accordingly, for all the reasons described above, Applicant respectfully requests that the rejections of claims 47-50 and 66-75 be reversed.